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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JERRY SCHNEIDERMAN, JERRY RANALLO, LARRY BUTLER and INSERTION ADVERTISING CORP.,

Petitioners,

-vs.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Should the Court resolve the conflict among the Circuit Courts of Appeals with respect to the standard of knowledge and/or intent to be applied to a defendant's conduct in prosecutions under 21 U.S.C. §857, the federal criminal "drug paraphernalia" statute?

2. Does 21 U.S.C. §857, the federal criminal "drug paraphernalia" statute, lack a scienter requirement, thereby making it a strict liability offense and rendering it unconstitutional in violation of the Fifth Amendment's guarantee of Due Process?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Jerry Schneiderman, Jerry Ranallo, Larry Butler, and Insertion Advertising Corp. respectfully pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Second Circuit entered July 9, 1992 and September 29, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, at 1a-10a) is reported at 968 F.2d 1564 (2d Cir. 1992). The opinion of the District Court (Appendix B, *infra*, at 1b-21b) is reported at 777 F. Supp. 258 (S.D.N.Y. 1991). The Court of Appeals' September 29, 1992 Order denying petitioners' petition for rehearing (Appendix C, *infra*, at 1c), is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered July 9, 1992. A timely petition for rehearing was denied September 29, 1992, and this petition for a writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

21 U.S.C. §857(a) states in pertinent part:

Unlawfulness

(a) It is unlawful for any person -

(1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia;
(2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or
(3) to import or export drug paraphernalia.

21 U.S.C. §857(d) states in pertinent part:

Definition of "drug paraphernalia"

(d) The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing,

producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act (title II of Public Law 91-513) [21 U.S.C.A. §801 et seq.]. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body, such as -

(1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(2) water pipes;

(3) carburetion tubes and devices;

(4) smoking and carburetion masks;

(5) roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(6) miniature spoons with level capacities of one tenth cubic centimeter or less;

(7) chamber pipes;

(8) carburetor pipes;

(9) electric pipes;

(10) air-driven pipes;

(11) chillums;

(12) bongs;

(13) ice pipes or chillers;

(14) wired cigarette papers; or

(15) cocaine freebase kits.

21 U.S.C. §857(f) states in pertinent part:

Exemptions

(f) This section shall not apply to -

(1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items; or

(2) any item that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper or accessory.

STATEMENT OF THE CASE

Introduction

The federal mail order "drug paraphernalia" act, 21 U.S.C. §857 (subsequently repealed and reenacted as 21 U.S.C. §863), has yielded neither consistent nor coherent interpretation from either the district courts or the Circuit Courts of Appeal. In fact, the positions of two Circuits are diametric: the Second Circuit, in this case, has held that the government, in order to prove a violation of the statute, must establish that the *defendant* had the "subjective" knowledge or intent that the item in question was to be used illegally with controlled substances. However, the Eighth Circuit has held that the defendant's intent is not an element of the offense, and that the "objective" features of the *item* itself can precipitate a violation of the statute regardless of the defendant's knowledge and/or intent.

In addition, the Third Circuit, while stating that the defendant's knowledge and/or intent must be proved, nevertheless has promulgated a standard significantly different from that announced by the Second Circuit in this case. Thus, there are at least three different standards of intent nationally for the application of a single federal criminal statute. That situation, it is respectfully submitted, should be -- and needs to be -- resolved by this Court.

The source of the judicial confusion is the plain language of the statute, which manifests the clear Congressional intent to omit *any* knowledge or intent requirement from the statute. In this case, below, the District Court held that the statute lacked a scienter requirement, and, as a result, that it was unconstitutional. The Court of Appeals for the Second Circuit reversed that ruling and, in effect, rewrote the statute to include a scienter requirement. In so doing, the Court of Appeals relied in part on the statute's limited and ambiguous legislative history, and also found evidence of an intent requirement in a section of the statute that was so well disguised that the government had not even argued in the District Court that the section contained an intent requirement.

Indeed, in the District Court the government argued that the statute did not require proof of the defendant's knowledge and/or intent; the government asserted that proof of the suspect item's "objective" traits was sufficient for conviction. Yet, at oral argument before the Second Circuit, the government assured the Court of Appeals that in the interim the Department of Justice had instructed that the statute was to be applied in a manner that required proof of the defendant's knowledge and/or intent.

Notwithstanding those representations, four days later the Eighth Circuit issued its decision in *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652 (8th Cir. 1992), *cert. filed*, November 16, 1992 (Docket No. 92-903), in which the government urged the Eighth Circuit to adopt a standard that did *not* require proof of the defendant's knowledge and/or intent. Thus, enforcement, as well as interpretation, of the standard of intent for the statute has been uneven and contradictory.

As detailed below, examination of the statute, and the conflict among the Circuit Courts applying it, demonstrates that the District Court here was correct in ruling that the statute does not include a scienter requirement, and that it impermissibly creates a strict liability offense. As a result, the statute is unconstitutional.

Statement of the Facts

The petitioners, Jerry Schneiderman, Jerry Ranallo, Larry Butler, and Insertion Advertising Corp., were charged in a fourteen-count Indictment, 90 Cr. 656 (RWS), filed October 5, 1990, in the Southern District of New York. Count One charged all petitioners with conspiring to violate 21 U.S.C. §857 (use of interstate conveyance to sell and/or offer for sale "drug paraphernalia") and 18 U.S.C. §1956(a) (conducting a financial transaction involving the proceeds of a designated offense), in violation of 18 U.S.C. §371.

Counts Two through Six charged all petitioners with violations of 21 U.S.C. §857(a)(1): use of an interstate conveyance as part of a scheme to sell "drug paraphernalia". Counts Seven through Twelve charged all petitioners with violations of §857(a)(2): offering "drug paraphernalia" for sale and transportation in interstate commerce. Count Thirteen charged petitioners Schneiderman, Ranallo, and Insertion Advertising Corp. with a violation of 18 U.S.C. §1956(a): conducting a financial transaction with the proceeds of a violation of 21 U.S.C. §857. Count Fourteen charged petitioners Schneiderman and Insertion Advertising Corp. with a violation of 18 U.S.C. §1957(a): engaging in a monetary transaction in criminally derived property of a value greater than $10,000 (the transfer of funds derived from violations of 21 U.S.C. §857).

A. *The Customs Investigation*

As a result of searches and seizures made at six retail stores in the United States, the United States Customs Service focused its attention on Insertion Advertising Corp., a wholesaler located in Manhattan, as well as on Central City Restaurant Supply Corp., located at the same address. In those searches and seizures, Customs agents found invoices and other documents indicating that Insertion Advertising had sold and purchased items the Customs agents believed were "drug paraphernalia". The invoices and documents, which included promotional sales material from Insertion Advertising and Central City, did not suggest, encourage, or imply that the items were designed or intended for use with illegal drugs. J.A. 93-99.[1]

The Customs agents contacted Insertion Advertising through an informant, attempted to purchase certain products, and did purchase some. In August 1990, the Customs agents sought a warrant to search the premises of Insertion Advertising, as well as the premises of Central City Restaurant Supply Corp. (at the same location), on the ground that the earnings of each business were derived solely from the sale of "drug paraphernalia", and that evidence of money laundering offenses would also be found there. J.A. 73-92. The warrants were issued, and the searches were executed August 22, 1990.[2]

B. *The Indictment*

Following the searches, the defendants were indicted. J.A. 15-30. The Indictment described the items allegedly sold and/or offered for sale by Insertion Advertising and Central City as "drug

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[1] "J.A." denotes the Joint Appendix in the Court of Appeals.

[2] As the government later conceded, the agents were completely wrong in their description of Central City's merchandise. J.A. 253. Thus, rather than deriving all of its revenue from "drug paraphernalia", Central City sold only lawful items that are not even capable of qualifying as "drug paraphernalia" under §857. *Id.* In addition, the government also subsequently conceded that the agents were wrong in their appraisal of Insertion Advertising's business, since the company sold many items that could not conceivably be classified as "drug paraphernalia" under any definition. J.A. 254. Included among those items were sunglasses, nail care sets, sunglass leashes, microscope slides, test tubes, a sound effects generator, fur tail key rings, and condoms. J.A. 93-94. In fact, three-quarters of the items initially listed as "drug paraphernalia", including *all* of Central City's merchandise, were subsequently returned to defendants by the government prior to the District Court's decision. J.A. 253-54.

paraphernalia" regardless how they were (otherwise) described on the companies' invoices and/or promotional materials.

The Indictment also charged petitioners Schneiderman, Ranallo, and Insertion Advertising with money laundering offenses. The conduct underlying the alleged offenses was simply the drawing and using of corporate checks (of Insertion Advertising) to pay distributing and manufacturing companies for the merchandise Insertion Advertising sold to retailers and other wholesalers. J.A. 26-27. The conspiracy count (Count One) also included, as overt acts in support of the money laundering prong of the conspiracy, petitioner Butler's and petitioner Schneiderman's depositing of their paychecks from Insertion Advertising in their personal bank accounts. J.A. 7-8.[3]

C. *The District Court's Decision and Opinion*

Defendants challenged the legality of the searches conducted, as well as the applicability of the money laundering statutes to their conduct. Defendants also moved to dismiss the Indictment because the "drug paraphernalia" statute, 21 U.S.C. §857,[4] denied petitioners Due Process because it lacked a scienter requirement, and because it was unconstitutionally vague.

Following argument, and several additional submissions by the parties, the District Court issued an opinion declaring §857 unconstitutional because it lacked a scienter requirement and because its terms were unconstitutionally vague. *See* App. B at 10b-21b; 777 F. Supp. at 266-71. J.A. 31-65.[5]

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[3] The Indictment identified Mr. Schneiderman as the president and owner of both Insertion Advertising and Central City. Mr. Butler was identified as an employee of Insertion Advertising, and Mr. Ranallo as Insertion Advertising's office manager. J.A. 17.

[4] During the pendency of this case, Congress repealed §857 and re-enacted it as 21 U.S.C. §863. *See* App. B at 5b; *United States* v. *Schneiderman*, 777 F. Supp. 258, 260-61 (S.D.N.Y. 1991), *rev'd*, 968 F.2d 1564, 1565, n. 1 (2d Cir. 1992); App. A at 2a, n. 1. Since defendants were charged under §857, the parties have consistently referred to the statute by that number even though, for purposes of analysis here, it is indistinguishable from §863. *Id. See also* Government's Brief on Appeal at 6 n. *.

[5] The District Court also denied defendants' motion to suppress evidence, J.A. 37-44, and, because the money-laundering charges were dependent on the "drug paraphernalia" counts, did not reach defendants' motions to dismiss the money laundering counts on independent grounds. J.A. 64-65.

The District Court opinion cited as reasons for its determination the plain language of the statute, the clear Congressional purpose with respect to the omission of an intent requirement, including the critical differences between §857 and the Drug Enforcement Administration's Model Drug Paraphernalia Act upon which it was closely patterned. *Id.*

D. *The Court of Appeals' Decision and Opinion*

The Court of Appeals reversed the District Court's decision. The Court of Appeals cited two reasons for its conclusion that "Congress intended to include a scienter provision in §857[,]" even though such a provision was not "explicitly set forth" in the statute. App. A at 4a-5a; 968 F.2d at 1566-67. The first was that in §857(d), entitled "definition of 'drug paraphernalia'", the phrase defining "drug paraphernalia" as any item "primarily intended or designed for use" (with illegal drugs) served the "dual purpose" of "circumscrib[ing] the category of items a defendant may be punished for distributing, and it also strongly implies that some mental state is required." *Id.*

The Court of Appeals also found that the "legislative history of §857 offers some guidance." App. A at 5a; 968 F.2d at 1567. The Court of Appeals cited an exchange between two Congressmen in which the bill's sponsor, answering a colleague's question, stated that "the government would be required to prove 'intent on the part of the defendant in a particular trial.'" *Id.*

Thus, while acknowledging that "since the scienter standard is not explicitly set forth but only implied by the wording of the definitional section, it is not surprising that the content of the [scienter] element is somewhat uncertain[,]" the Court of Appeals nonetheless ruled that "'primarily intended' [in §857(d)] refers only to the subjective intent of the person charged with dealing in the proscribed articles." *Id.*

However, the Court of Appeals explained that "[i]ntent here . . . refers only to knowledge about likely consequences[,]" and that "[t]o show a defendant 'primarily intended' to sell drug paraphernalia, the government need not show that the item would be used in connection with illegal drugs, but it must prove that the defendant knew there was a strong probability the items would be so used." *Id.*

REASONS FOR GRANTING THE WRIT

A. There Is A Conflict Among the Circuit Courts Regarding the Standard of Knowledge and Intent to Be Applied Under 21 U.S.C. §857, Which Conflict Should Be Resolved By This Court

In addressing 21 U.S.C. §857, the Circuit Courts of Appeal have staked out three conflicting positions with respect to the standard of intent imposed by the statute: the Second and Third Circuits have read into the statute a scienter element requiring proof of the defendant's state of mind, but differ as to the level of proof required, while the Eighth Circuit has found that the statute does not contain any such scienter requirement. Also, it is not only the Courts that have disagreed with respect to the scope of a crucial element of a federal criminal statute. As detailed below, the government, too, has adopted contrary positions with respect to enforcement; indeed, it has done so in this very case, in which its position before the Court of Appeals was the exact opposite of that it assumed in the District Court.

As described *supra*, at 8, in this case the Second Circuit held that the government must prove the intent (which, in this instance, the Court of Appeals described as "knowledge about likely consequences") of "the person charged with dealing in the proscribed articles." App. A at 5a; 968 F.2d at 1567.

Four days later, the Eighth Circuit, in *United States v. Posters 'N' Things Ltd.*, 969 F.2d 652 (8th Cir. 1992), *cert. filed*, November 16, 1992 (Docket No. 92-903) held the opposite: that §857 does not focus on or demand proof of the particular defendant's knowledge and/or intent. 969 F.2d at 657 ("Nowhere in the statute, for example, does it state that a person is only prohibited from 'knowingly' selling drug paraphernalia or from selling items with the 'intent' that they be used as drug paraphernalia") (footnote omitted).

Four months later, the Third Circuit, in *United States v. Mishra*, ___ F.2d ___, Docket No. 91-3874 (3d Cir. October 29, 1992) [available on WestLaw 1992 WL 310351], while agreeing with the Second Circuit that it was the defendant's knowledge and/or intent that must be proved, adopted a decidedly different standard. While the Second Circuit requires that the defendant know there exists a "strong probability" that the charged items are to be used illegally with controlled substances, App. A at 5a; 968 F.2d at 1567, the Third Circuit held that in order to obtain a conviction "the government would need to establish that the defendant seller *contemplated, or reasonably expected under the circumstances*, that the item sold offered would be used with illegal drugs." ___ F.2d at ___; slip op. at 15 (footnote

omitted) (emphasis added).[6] The language employed in either the Second Circuit's or Third Circuit's standard does not, of course, appear anywhere in §857 itself.

Moreover, the Second Circuit and the Eighth Circuits, examining the same statute and the same legislative history, disagreed completely about their impact and meaning. As detailed *supra*, at 8, the Second Circuit held that §857's scienter requirement was contained within §857(d), the section that defines "drug paraphernalia". The Second Circuit also found support for the presence of a scienter requirement in the legislative history.

In stark contrast, the Eighth Circuit, in *Posters 'N' Things*, *supra*, held that the statute's definitional section, §857(d), enumerates purely "objective" standards "irrespective of a defendant's subjective intent." 969 F.2d at 658. Also, regarding the very same passages of Congressional colloquy relied on by the Second Circuit below in this case, the Eighth Circuit remained "unconvinced [that it established a "subjective" scienter requirement] and [] found that what little legislative history exists is either contradictory or of no help in interpreting the statute." 969 F.2d at 657, n. 3. Thus, three Circuit Courts have developed three different standards of knowledge and/or intent for the application of a federal criminal statute. These conflicting interpretations reflect as well the inconsistent enforcement standards employed by the government. In fact, this case illustrates how the government has been unable to apply a coherent and consistent standard of knowledge and/or intent under the statute.

Here, in response to petitioners' motions in the District Court challenging the statute's constitutionality, the government initially maintained that what constitutes "drug paraphernalia" is determined simply by the "objective features of the objects themselves[,]" and that the list of items in §857(d)(1)-(15) "specifies items that can be identified as drug paraphernalia by virtue of their unique physical appearance." *See* Government's Memorandum of Law in Opposition to Defendants' Pretrial Motions (hereinafter "Memo in Opposition"), at 36.

However, at page 49 of its Memo in Opposition, the government added another two elements, stating that to establish that a

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[6] The Second Circuit's "strong probability" standard was gleaned from the Sixth Circuit's prior decision in *United States* v. *57,261 Items of Drug Paraphernalia*, 869 F.2d 955, 957 (6th Cir), *cert. denied*, 493 U.S. 933 (1989). Subsequently, the Tenth Circuit, in *United States* v. *Murphy*, 977 F.2d 503 (10th Cir. 1992), followed without significant comment the reasoning and result of the Second Circuit's opinion in this case.

particular item is "drug paraphernalia" the government must prove (a) its objective characteristics, (b) its "nature", and (c) the "descriptions and circumstances set forth in §857(d) and (e)." The government also argued that the purpose of the eight "matters considered in determination of what constitutes drug paraphernalia" in §857(e)(1)-(8) was to provide "relevant considerations in determining the objective characteristics of the items and their surrounding circumstances." *See* Government's Memo in Opposition, at 37.

At oral argument on the motions before the District Court, the Assistant United States Attorney asserted that, with respect to knowledge and intent, the government need only prove beyond a reasonable doubt that "this defendant has to know the objective characteristics of the item." J.A. 297. The Assistant also admitted that even this "objective" knowledge and intent requirement "must be implied" from the statute. *Id.*

Upon further inquiry by the District Court, the Assistant resisted the notion that the government would have to prove that the defendant knew the items in question were "being used in connection with drugs." J.A. 298. The Assistant maintained, "the burden is on the government to establish the primary use [of the item alleged to be "drug paraphernalia"]. . . . [The government will] have to show that the defendant knows what the general characteristics of the item are." J.A. 299.

In the Court of Appeals, however, the government dramatically altered its position. In its Brief on Appeal below, the government for the first time in this case pointed to the definitional section, §857(d), as the repository of the scienter requirement, and argued that "the ultimate question of guilt depends on proof of a defendant's own subjective intent." Government's Brief on Appeal at 9, n. *, 13-17, 27.

In addition, at oral argument, when confronted with its changes in position, the Assistant United States Attorney assured the panel that the Department of Justice had directed that the statute was to be enforced under a "subjective" standard – that the defendant's knowledge and/or intent must be proved. Yet only four days later the Eighth Circuit issued its decision in *Posters 'N' Things*, *supra*, dispensing with that critical requirement.[7]

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[7] The government's several shifts in positions in this case do not represent an evolution of its enforcement standards. Rather, they are simply a repetition of the differing standards applied in separate cases that have plagued enforcement of the statute since its enactment. *Compare United States* v. *Main Street Distributing, Inc.*, 700 F. Supp. 655 (E.D.N.Y. 1988), with *United States* v.

As a result of the judicial and prosecutorial conflict and confusion with respect to the standard of knowledge and/or intent required under §857, a federal criminal statute is being enforced and interpreted in graphically different fashion in different Circuits. It is respectfully submitted that this conflict, which directly threatens not only the uniform application of federal criminal statutes, but also affects the most precious right of liberty, should be resolved by this Court.

B. The Statute Lacks A Scienter Requirement, and Impermissibly Creates a Strict Liability Offense, Rendering It Unconstitutional

In resolving this conflict among the Circuit Courts of Appeal, as well as the confusion among prosecutors, it is apparent that the source is the absence of a sufficient scienter requirement in §857. In response, courts have effectively rewritten the statute, providing their own, and conflicting, standards. However, the plain language of the statute, the clear intent of Congress, and the rules of statutory construction all compel the conclusion, as was reached by the District Court in this case, that §857's scienter requirement cannot withstand constitutional scrutiny.[8]

Dyer, 750 F. Supp. 1278, 1283 (E.D.Va. 1990).

[8] In *Posters 'N' Things*, *supra*, the Eighth Circuit held that an "objective" standard did not offend Due Process. 969 F.2d at 658-59. *See also United States* v. *Mishra*, *supra*, ___ F.2d at ___, slip op. at 11-12. Here, the government, below in its Brief on Appeal (at 10-11) and at oral argument, conceded that an "objective" standard would make §857 a "strict liability" statute in violation of the Constitution. Traditionally, "strict liability" in criminal law has been limited to "general welfare" statutes that, *inter alia*, provide relatively mild sanctions. *See e.g. Morissette v. United States*, 342 U.S. 246, 256 (1952); *Levas & Levas v. Village of Antioch*, 684 F.2d 446, 455 (7th Cir. 1982); LaFave and Scott, *Handbook on the Criminal Law*, §31 at 218-223 (1972). *See also* App. A at 4a; 968 F.2d at 1566. As the District Court stated, App. B. at 15b-16b, 777 F. Supp. at 268, here, §857, since it carries stiff maximum penalties (three years' imprisonment and a $100,000 fine), and can be used as a springboard for other offenses with even more serious punishment, such as the money laundering charges present in the Indictment here (that carry the potential for 20-year prison terms), cannot qualify as a strict liability offense.

1. The Language of §857 Does Not Include A Scienter Requirement

Certainly, the statutory language does not include an *in haec verba* scienter requirement. As the Second Circuit acknowledged, a scienter requirement is not "explicitly set forth" in the statute. App. A at 5a; 968 F.2d at 1566-67. The Eighth Circuit concurred in *Posters 'N' Things*, *supra*, concluding that it found "nothing in the language of section 857 that would require a subjective scienter interpretation." 969 F.2d at 657 (footnote omitted). The statute makes it unlawful, simply,

(1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia;
(2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or
(3) to import or export drug paraphernalia.

21 U.S.C. §857(a). *See supra* at 2.

That description of the offense does not include specific intent (i.e., the defendant's knowledge and/or intent that the item is "primarily intended or designed for use" with controlled substances). Thus, as the District Court found, §857 is "facially devoid of a mens rea requirement." App. B at 13b; 777 F. Supp. at 266. *See also United States v. Dyer*, 750 F. Supp. 1278, 1283-88 (E.D.Va. 1990).

2. The Plain Language of §857 Indicates A "Contrary Purpose" That Overcomes the Presumption of the Inclusion of a Scienter Requirement

As this Court has instructed, even though a statute may not contain an express scienter provision, that "does not signal a departure from the background assumption of our criminal law" that "criminal offenses requiring no *mens rea* have a 'generally disfavored status.'" *Liparota v. United States*, 471 U.S. 419, 426 (1985), *quoting United States v. United States Gypsum Co.*, 438 U.S 422, 438 (1978). Thus, under ordinary circumstances, a scienter element is presumed. In *Liparota*, this Court stated that "indication of contrary purpose in the language or legislative history of the statute" could override the presumption of the inclusion of a scienter requirement. 471 U.S. at 425.[9] That is the case with respect to §857, since the language of the

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[9] *Liparota* is easily distinguished from this case. In *Liparota*, both of the sections at issue contained the modifier "knowingly", and a construction that eliminated intent from one of those sections would have created an anomaly because it would have obliterated the distinction between the subsections, and

statute, as well as its background and history, provide an irrefutable contrary purpose regarding scienter.

a. The Statutory Language Evinces An Intent to Omit A Scienter Requirement

i. *The Exemptions Section: §857(f)*

The exemptions created by §857(f), which provide that the statute shall not apply to (1) persons "authorized" by law "to manufacture, possess, or distribute such items" or (2) any item "traditionally intended" for with tobacco products (*see supra* at 3), demonstrate that §857 was designed consciously to *omit* a scienter requirement related to the defendant's intent. The exemptions do not refer to the defendant's intent; rather, they refer to "objective" considerations, such as licensing, or an item's "traditional" use.

If §857 were intended to require the defendant's knowledge and/or intent, the "exemptions" in §857(f) would be superfluous. For example, if it were part of the government's burden to prove that a defendant knew or "primarily intended" that an item was to be used illegally with drugs, then it would not matter whether the sale or offer for sale was "authorized", or whether the "traditional" use of the item was legitimate.

The "exemptions" obtain meaning only if proof of the defendant's knowledge and/or intent is not part of the government's burden. The nature of the exemptions, which do not refer at all to a defendant's knowledge and/or intent, demonstrate that objective criteria, rather than the *defendant's* knowledge and/or intent, control a defendant's criminal liability.

ii. *The "Matters to Be Considered": §857(e)*

The statute, in §857(e), also lists eight "matters considered in determination of what constitutes drug paraphernalia". The section instructs that "[i]n determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following [eight listed factors] may be considered[.]" This subsection, too, manifests §857's purposeful omission of any scienter requirement that refers to the defendant's state of mind.

The eight factors in §857(e) focus on matters that may very well

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enabled the government to institute all prosecution under the subsection imposing strict liability. 471 U.S. at 426-30.

be outside a defendant's purview (such as national advertising, manner of display, or instructions or descriptive materials that are supplied at a subsequent point in the economic chain, expert testimony regarding predominant forms of use, and the scope of legitimate uses in the community). *See, e.g., Dyer, supra*, 750 F. Supp. at 1286 & n. 17; *United States v. 57,261 Items of Drug Paraphernalia*, 705 F. Supp. 1256, 1264 (M.D.Tenn. 1988), *aff'd*, 869 F.2d 955 (6th Cir.), *cert. denied*, 493 U.S. 933 (1989).

In fact, in *Posters 'N' Things, supra*, the Eighth Circuit found that "none of [the eight factors in §857(e)] are dependent on the defendant's subjective state of mind." 969 F.2d at 658. Also, here, before the District Court, the government, in its Memo in Opposition, at 37, argued that the eight "matters" in 857(e) provide only "relevant considerations in determining the objective characteristics of the items and their surrounding circumstances." Thus, unmistakably, the focus of the determination under §857(e) is not on the defendant's intent, but rather on "objective" factors.

iii. *The Definitional Section: §857(d)*

The section of the statute that defines "drug paraphernalia", §857(d), essentially denominates as "drug paraphernalia" any item "primarily designed or intended" for use illegally with controlled substances. This is the section in which the Court of Appeals below found the scienter requirement. App. A at 5a; 968 F.2d at 1566-67. However, a reading and analysis of the section demonstrates that it does not, and was not intended to, require the knowledge and/or intent of the defendant.

As the Second Circuit conceded below, "the content of the [scienter] element is somewhat uncertain[]" due to, according to the Court of Appeals, "the special complication in this statute that the phrase 'primarily intended or designed for use' serves the dual purpose of defining the item and implying a scienter requirement." App. A at 5a; 968 F.2d at 1567. Indeed, the scienter standard the Court of Appeals found in §857(d) was so well camouflaged that the government did not even argue its existence in the District Court, but, as noted *supra* at 10-11, came to the realization that §857(d) served this "dual purpose" only on appeal, after the District Court had declared the statute unconstitutional.

In fact, §857(d) does not support the Court of Appeals' interpretation; instead, it refutes it. The section's purpose is plain from its title: "*Definition* of 'drug paraphernalia'". 21 U.S.C. §857(d); *see supra* at 2 (emphasis added). It does not purport to provide a scienter

requirement, but only a "definition" of "drug paraphernalia".[10]

The section covers the "design" purpose effected by the manufacturer, and the ultimate "use" to which the item is put. Thus, the section concentrates on two particular persons along the chain of possession, but not necessarily on the *defendant*, who, in many if not most cases (including this case), is neither a manufacturer or user, but instead is a distributor or retailer somewhere along the chain of commerce between manufacturer and user. In effect, in defining "drug paraphernalia", §857(d) disregards the knowledge and/or intent of the defendant in favor of a determination of the "objective" design characteristics and/or eventual use of an item.[11]

In fact, this Court, in *Village of Hoffman Estates, Inc. v. The Flipside, Inc.*, 455 U.S. 489 (1982), in which this Court upheld a local civil licensing "drug paraphernalia" ordinance against a pre-enforcement vagueness attack, noted unequivocally that the phrase "designed for use" was purely "objective" in character, thereby not implicating at all a defendant's intent: "the standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features." 455 U.S. at 501-02. *See also Garner v. White*, 726 F.2d 1274, 1281 (8th Cir. 1984); *Florida Businessmen for Free Enterprise v. City of Florida*, 673 F.2d 1213, 1218 (11th Cir. 1982); *United States v. Dyer*, *supra*, 750 F. Supp. at 1285 & n. 14.

In addition, the use of the phrase "primarily intended" also indicates a "contrary purpose" other than requiring scienter. If "primarily intended" were related to the defendant's intent, §857 would be an extraordinary statute: only if a defendant's illicit intent accounted for more than 50% of his total intent would he be in violation of the statute. Or, in cases in which a defendant's conduct had several purposes, would a mere plurality of illegal intent suffice? The practical

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[10] The District Court pointed out below that if the relevant language in §857(d) referred to the defendant's intent toward the objects in question, "then Congress would not have followed it with a laundry list of terms describing paraphernalia [§857(d)(1)-(15)], or a separate subsection of matters to be considered in determining whether an object is paraphernalia [§857(e)(1)-(8)]." App. B at 15b; 777 F. Supp. at 267.

[11] In *United States* v. *Dyer*, *supra*, the District Court remarked that construing §857 to constitute a scienter standard requiring proof of the defendant's knowledge and/or intent represents a "judicially imposed" amendment of the statute, since "the actual statutory language noticeably omits any [ ] qualifying phrase" such as "primarily intended or designed for use [with drugs] *by the defendant*." 750 F. Supp. at 1288 (emphasis in original).

consequences of judging what intent is "primary" further demonstrates Congress's "contrary purpose" in employing the "primarily intended" language in §857.

Also, as the District Court noted below, review of the other Title 21 criminal offenses reveals that they require that the prohibited act be performed "knowingly and intentionally". *See, e.g.*, 21 U.S.C. §§841(a), 842(b)(2)(A), 843(a)(6), 844(a) & 856. App B at 13b; 777 F. Supp. at 266. *See also United States v. Dyer, supra*, 750 F. Supp. at 1288 n. 20. Section 856, which targets facilities used or managed to manufacture controlled substances, was enacted at the same time as §857 (both were passed as part of Pub. L. 99-570, enacted October 27, 1986), and includes the "knowingly" [§856(a)(1)] and "knowingly and intentionally" [§856(a)(2)] language. Thus, with respect to a statute covering an analogous situation -- the use of otherwise neutral objects (in the case of §856, "premises") in connection with illegal drug activity -- Congress knew full well how to require a defendant's intent. Clearly, by departing from the "knowingly and intentionally" language that appears in every other Title 21 felony criminal offense, Congress decided to omit such a scienter requirement from §857.

b. The Drastic Differences Between §857 and the Drug Enforcement Administration's Model Drug Paraphernalia Act Evince a Clear Intent to Omit From § 857 a Scienter Requirement

That §857(d) was designed to serve only its stated purpose -- *defining* "drug paraphernalia" -- and not the additional, unannounced function of scienter, is also apparent from examination of the federal Drug Enforcement Administration's Model Drug Paraphernalia Act (hereinafter the "Model Act"), which, as Congress, the government, and the Court of Appeals have agreed, served as the blueprint for §857. App. A at 4a; 968 F.2d at 1566. *See also United States v. Lin*, 962 F.2d 251, 256-57 (2d Cir. 1992); App. B at 12b-13b [777 F. Supp. at 266]; Government's Brief on Appeal at 12-13. In fact, comparison of §857 and the Model Act leads indisputably to the conclusion that §857 was not intended to require scienter on the part of the defendant.

Unlike §857, the Model Act has both a definitional section, Article I, and a separate scienter requirement, Article II. J.A. 130-32.[12] The structure is a response to the peculiar needs of "drug

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[12] The Model Act was drafted in 1979 by the Department of Justice, and was designed as local and/or statewide legislation. It has been adopted by several states and localities, and, as the cases cited *infra* attest, has in large part withstood pre-enforcement facial vagueness challenges to its constitutionality.

paraphernalia" legislation. Such legislation is somewhat unique compared, for example, with drug statutes, because, while drugs are contraband *per se*, the illegality of "drug paraphernalia" depends on an assessment of variable facts, and, therefore, requires the two-step analysis of first defining the proscribed item as "drug paraphernalia" and then determining the defendant's knowledge and/or intent. *See, e.g., Hejira Corp. v. MacFarlane*, 660 F.2d 1356, 1366-67 (10th Cir. 1981).

The Model Act's intent provision makes it "unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used" with controlled substances. *See* Article II, Section B (J.A. 132). *See also* App. B at 13b; 777 F. Supp. at 266.

Yet Congress, obviously cognizant of the provisions of the Model Act, clearly and deliberately chose *not* to incorporate the Model Act's intent section into §857. As the District Court explained, "Excision of such an important element of the offense could not have been inadvertent." *Id. See also United States v. Posters 'N' Things, supra*, 969 F.2d at 657-58, n. 4 (noting §857's deviation from Model Act by omitting any "subjective" intent requirement).[13]

Moreover, the government's position and the Court of Appeals' decision below in this case – that the deletion of the Model Act's separate scienter section was, in effect, meaningless – is contrary to that of the drafters of the Model Act.

For example, Irvin B. Nathan, at the time Deputy Assistant Attorney General and a principal framer of the Model Act, explained in his testimony before the House Select Committee on Narcotics and Drug Abuse Control in November 1979 [quoted in *Brache v. Westchester*, 507 F. Supp. 566, 575 (S.D.N.Y. 1981), *rev'd*, 658 F.2d 47 (2d Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982)(emphasis added)]:

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13 The legislation's chief sponsor, Representative Mel Levine, told the Subcommittee on Crime that the bill was "drafted closely after the Model Drug Paraphernalia Act," and "deliberately incorporates much of the same language that is contained in that act." *Hearings Before the Subcommittee On Crime of the Committee on the Judiciary*, House of Representatives, 99th Congress, 2d Session, on H.R. 1625, Mail Order Drug Paraphernalia Control Act, May 8, 1986, Serial No. 99, at 15. Thus, the drafters' rejection of the Model Act's scienter requirement was just as intentional.

> The model statute attempts to address the primary constitutional objections to the existing state laws, i.e., they are void for vagueness because they do not give fair notice as to what is proscribed. First, the statute enumerates with considerable specificity the precise items which are banned. *Secondly, and even more importantly, the statute requires that a defendant charged with possession have the 'specific intent' to use the item in conjunction with a controlled substance.*

The Commentary to the Model Act also clearly distinguishes between the definitional section and the intent provision. The Commentary notes that the definitional section "provides a comprehensive definition of the term 'Drug Paraphernalia' and includes descriptions of the most common forms of paraphernalia[,]" while the separate scienter provision "clearly defines what conduct is prohibited, and it specifies what criminal state of mind must accompany such conduct." J.A. 129.

Thus, under the Model Act, the definitional section and the intent section perform different and essential functions. Neither is supposed to serve as a substitute for the other. As a result, under the Model Act, an item can be "drug paraphernalia" without the defendant ever knowing it – it can be based on the manufacturer's "design", or the ultimate purchaser's "intended use" – but the defendant has not violated the Model Act unless he acts with knowledge, or under circumstances in which he reasonably should know, that the item will be used with controlled substances.

That essential element – the defendant's knowledge and/or intent – is missing from §857, and renders it unconstitutional. In fact, prior to the enactment of §857, litigation over the constitutionality of the Model Act and legislation patterned after it established that it was the separate intent requirement – which, in those cases, either replicated that found in the Model Act, or was even stricter – that saved the Model Act's and those ordinances' constitutional validity.

For example, in *Murphy v. Matheson*, 742 F.2d 564 (10th Cir. 1984), the court, in addressing a statute that contained a "high specific intent requirement" like that in the Model Act, 742 F.2d at 573, 580, remarked that "[a]lthough we are troubled somewhat by the ambiguity of the definitional term, when taken alone, we believe that a fair reading of the statute as a *whole* indicates that the intent referred to is that of persons alleged to have violated the statute." 742 F.2d at 570 (emphasis in original).

In *Murphy*, the Tenth Circuit, in support of the above conclusion, cited and quoted from *Casbah v. Thone*, 651 F.2d 551 (8th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982), in which the Eighth Circuit explained that the definitional section's "deficiency in draftsmanship is explained" and ameliorated by the separate intent sections, which "provide clarity by linking the requirement of intent with the person whose activity is forbidden." 651 F.2d at 559. *See also Garner v. White*, *supra*, 726 F.2d at 1282 n. 10 (stressing importance of statute's separate intent section that was "virtually identical" to that in Model Act); *New England Accessories Trade Association v. Tierney*, 691 F.2d 35, 36 (1st Cir. 1982) (definitional section not objectionable when read in light of separate intent section defining substantive offenses that "focus on the mental state of the accused"); *Tobacco Accessories v. Treen*, 681 F.2d 378, 385 (5th Cir. 1982) (Court notes that separate intent section imposes a stricter intent standard than even the Model Act); *New England Accessories Trade Association v. City of Nashua*, 679 F.2d 1, 6 (1st Cir. 1982) (in statute containing a separate intent section based on the Model Act, it was the express "requirement of knowledge on the part of the defendant when coupled with use or intended for use in the definition of drug paraphernalia, [that] provide[d] adequate notice..." of the statute's prohibitions) (quotation omitted); *Florida Businessmen for Free Enterprise v. City of Hollywood*, *supra*, 673 F.2d at 1219 (statute adopted Model Act's separate scienter requirement); *Hejira Corp. v. MacFarlane*, *supra*, 660 F.2d at 1366-67 (Court notes that judicial analysis of "drug paraphernalia" legislation has required scienter in both the definitional section as well as in a separate section defining the substantive offense).

Thus, even assuming *arguendo* that §857(d) did contain some element of scienter (which, in fact, it does not), the cases make it clear that the definitional section is not a substitute for an intent requirement, and alone would not suffice. In the cases that have addressed the issue, it was each statute *as a whole*, with the separate specific intent sections borrowed from the Model Act, that rendered each constitutional. *See Murphy v. Matheson*, *supra*, 742 F.2d at 570; *NEATA v. Tierney*, *supra*, 691 F.2d at 36; *Casbah v. Thone*, *supra*, 651 F.2d at 559.

3. The Ambiguous Legislative Debate on §857 Is Insufficient to Overcome the Statute's Clear Language and Design to Omit A Scienter Requirement

In its opinion below, the Court of Appeals acknowledged that §857 was "patterned" after the DEA Model Act, and that while the Model Act included an explicit "subjective" intent requirement, that provision "does not appear in §857." App. A at 4a; 968 F.2d at 1566.

However, the Court of Appeals held that "[i]t does not follow, however, that such a comparison [between §857 and the DEA Model Act] should determine whether §857 requires scienter[,]" and that "[t]he absence from §857 of the Model Act language does not override the presumption in favor of requiring scienter[.]" App. A at 4a-5a; 968 F.2d at 1366.[14]

The Court of Appeals chose instead to rely on a brief exchange between two Congressmen for "textual support suggesting that Congress intended that §857 include a scienter requirement." App. A at 5a; 968 F.2d at 1566-67. In that brief discussion, the statute's sponsor, in response to a question from a colleague, indicated that under §857's terms proof of the defendant's scienter would be required. App. A at 5a; 968 F.2d at 1567.

However, examination of the legislative history is appropriate only in the absence of clear statutory language; here, §857 plainly does not include a scienter standard, so the legislative history need not be consulted. *See Freytag v. C.I.R.*, ___ U.S. ___, 111 S. Ct. 2631, 2636 (1991); *United States v. Dyer*, *supra*, 750 F. Supp. at 1288-89 & n. 22.

Also, this Court has repeatedly cautioned against interpreting statutes based on isolated comments by legislators. For example, in *West Virginia University Hospitals, Inc. v. Casey*, ___ U.S. ___, 111 S. Ct. 1138, 1147 (1991), this Court instructed that

> The best evidence of [a statute's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous -- that has a clearly accepted meaning in both legislative and judicial practice -- we do not permit it to be expanded or contracted by the statements of individual legislators or committees

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[14] In another case involving construction of §857, *United States* v. *Lin*, *supra*, a different panel of the Second Circuit, noting the distinctions between the Model Act's and §857's definition of "drug paraphernalia", held that §857's omission of the Model Act's reference to "packages and containers" "signalled an intent to exclude packages and containers from" §857. 962 F.2d at 256. In its analysis in *Lin*, the Second Circuit explained that "[o]f particular significance is [§857's] striking similarity to, and *even more importantly, its differences from* the Model Drug Paraphernalia Act ('Model Act'), which was drafted by the Drug Enforcement Administration in 1979." 962 F.2d at 256 (emphasis added). Thus, the Second Circuit concluded in *Lin* that Congress, in passing §857, "although strongly influenced by the Model Act, decided to enact a narrower statute, one that did not include packages and containers among its proscriptions." 962 F.2d at 257.

during the course of the enactment process.

___ U.S. ___, 111 S. Ct. at 1147 (citations omitted).

In addition, even if the language of §857 were sufficiently ambiguous to warrant exploration of the legislative history, such scrutiny would not yield the result reached by the Court of Appeals below. While the Court of Appeals below relied on the single interchange between Congressmen, the Eighth Circuit, in *Posters 'N' Things*, *supra*, examining the same text, was "unconvinced and [] found that what little legislative history exists is either contradictory or of no help in interpreting the statute." 969 F.2d at 657, n. 3. *See also United States v. Dyer*, *supra*, 750 F. Supp. at 1288 ("meager" legislative history of §857 is "at best ambiguous[ ] and therefore not particularly helpful in the quest for the statute's meaning") (footnote omitted). Here, the ambiguity of the comments made by legislators during the legislative process only reinforces the wisdom of the prevailing view that such sources are not an effective means of determining the meaning of a statute or even Congressional intent.

In any event, the portions of the legislative process cited by the Court of Appeals below here in support of the position that Congress intended §857 to have a scienter requirement pale before the weight of the unambiguous statutory language and the deliberate drastic deviations from the Model Act, both of which amply demonstrate the clear legislative intent *not* to include a scienter requirement.[15]

4. The Court of Appeals Impermissibly Rewrote §857 to Include a Scienter Requirement

In effect, the Court of Appeals below redrafted §857, inserting the missing scienter requirement in order to preserve the statute's constitutionality. However, as this Court has stressed, that is not the province of the courts. Nor is ambiguous legislative history a substitute for errors in legislative draftsmanship.

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15 Moreover, as the District Court observed, the clear weight of the legislative history, including Congressman Levine's own remarks at other points in the Congressional hearings, *see* App. B at 13b-14b; 777 F. Supp. at 266, reveals that the focus of the legislation was on the object at issue, and whether it constituted "drug paraphernalia" as a result of its objective characteristics, and not on the defendant who is accused. *Id.* The passages cited in the District Court's opinion amply establish that priority among the legislators. *Id.*

As this Court declared in *United States v. Bass*, 404 U.S. 336 (1971),

> [w]hile courts should interpret a statute with an eye to the surrounding statutory landscape and an ear for harmonizing potentially discordant provisions, these guiding principles are not substitutes for congressional lawmaking.

404 U.S. at 344. *See also United States v. Lin*, *supra*, 962 F.2d at 257 (Court refuses to include "crack vials" within ambit of §857, due to their "transparent deletion" from the statute, despite government's reliance on the policy underlying the statute, since "such a policy decision was, and is, 'for Congress and not this Court to effectuate'") (citation omitted).

The failure of §857 to include a scienter requirement has precipitated a conflict among the Circuit Courts of Appeal, and inconsistent standards applied to enforcement of §857, which in this case have led to judicial revision of Congressional legislation. It is respectfully submitted that this Court should resolve this fundamental conflict over the scope of this federal criminal statute, create uniformity in the interpretation and enforcement of the statute, and grant this petition for a writ of certiorari.

CONCLUSION

For all the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: December 23, 1992
New York, New York

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1109-August Term, 1991

Argued: March 24, 1992 Decided: July 9, 1992

Docket No. 91-1695

UNITED STATES OF AMERICA,

Appellant,

- against -

JERRY SCHNEIDERMAN, JERRY RANALLO, LARRY BUTLER and INSERTION ADVERTISING CORP.,

Appellees.

Before:

LUMBARD, NEWMAN, and CARDAMONE,
Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Sweet, J., dismissing an indictment under the Mail Order Drug Paraphernalia Control Act, 21 U.S.C. § 857, based on a determination that the statute is unconstitutional.

Because the statute requires scienter and is not unconstitutionally vague, the order dismissing the indictment is reversed.

SETH C. FARBER, Assistant United States Attorney, New York, N.Y. (Otto G. Obermaier, United States Attorney for the Southern District of New York, Michele Hirshman, Katherine A. Bostick, Assistant United States Attorneys, New York, N.Y., of counsel), for Appellant.

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RICHARD WARE LEVITT, New York, N.Y. for Appellee Jerry Schneiderman and Insertion Advertising Corp.

DIARMUID WHITE, New York, N.Y. (Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, New York, N.Y., of counsel), for Appellee Larry Butler.

LUMBARD, Circuit Judge:

The government appeals from an order of the District Court for the Southern District of New York, Robert W. Sweet, Judge, which dismissed a fourteen-count indictment charging violations of the Mail Order Drug Paraphernalia Control Act, 21 U.S.C. § 857,[1] based on a determination that the statute is unconstitutionally vague. Because we conclude that § 857 includes a scienter requirement, it is not unconstitutional, either on its face or as applied to defendants. Accordingly, the order of dismissal is reversed and the case is remanded.

On August 22, 1990, the government obtained warrants to search the offices of Insertion Advertising and Central City Restaurant Supply Co., both located at 132 West 24th Street in Manhattan, to search the apartment of their owner, Jerry Schneiderman, and to seize three bank accounts. The warrants were based on affidavits of U.S. Customs Special Service Agent Peter Arnone who stated he had probable cause to believe Insertion Advertising and Central City were violating drug paraphernalia and money laundering laws. In the search that followed, government agents seized a large number of dual purpose

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1 The full text of 21 U.S.C. § 857 is reproduced as an appendix to this opinion. The Mail Order Drug Paraphernalia Control Act was repealed and reenacted by the Crime Control Act of 1990, Pub. L. No 1010-647, § 2401, 104 Stat. 4789, 4858-59 (codified at 21 U.S.C.A §863 (West Supp. 1992)).

objects, including rolling papers, stash cans, roach clips, mannitol, hemostats, glassine envelopes, amber glass containers and caps, nitrous oxide containers, balloons and various scales.[2] None of the objects are themselves illegal, but all can be used in illegal activities.

On October 5, 1990, a grand jury returned a fourteen-count indictment against the defendants. Five counts charged them with violating 21 U.S.C. §857(a)(1) by "unlawfully, willfully and knowingly" making use of interstate conveyances as part of a scheme to sell drug paraphernalia. Six counts further charged them with "unlawfully, willfully and knowingly" offering drug paraphernalia for sale and transportation in interstate commerce in violation of 21 U.S.C. §857(a)(2). The indictment also included two money laundering counts and a conspiracy count.

Defendants moved to suppress all the seized objects as the fruit of illegal searches and to dismiss the indictment on the ground that 21 U.S.C. §857 was unconstitutionally vague as applied to them. On October 29, 1991, Judge Sweet denied the motion to suppress but dismissed the indictment because he concluded § 857 was unconstitutionally vague. Since he believed the statute does not require scienter, Judge Sweet found the average person could not determine whether any given item qualified as paraphernalia for purposes of the statute. Therefore, those dealing in such articles were not given sufficient notice of proscribed conduct to meet the requirements of due process. Finding the provision unconstitutional, Judge Sweet dismissed the indictment. This appeal followed.

The government challenges the determination that § 857 is unconstitutionally vague. The Supreme Court has repeatedly held that "the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). In fact, the inclusion of an intent provision will often save an otherwise vague statute. *See Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 499 (1982).

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2 Many of the objects seized do not fit the narrowly tailored definition of paraphernalia which this court has adopted since Judge Sweet issued his order. See United States v. Hong-Liang Lin, No. 91-1297, slip op. at 3415-3433 (2d Cir. May 1, 1992). However, at least some of the items allegedly involved here do meet the statutory standard. See 21 U.S.C. §851 (d)(5) (specifically including roach clips as an example of paraphernalia). We leave it to the district court to evaluate the alleged paraphernalia in light of our holding in Lin.

I. Scienter

We first consider whether §857 includes a scienter element, and then, if so, the content of that a element. Federal courts have long held that imposition of criminal liability usually requires a finding of mental culpability. *See Morissette v. United States*, 342 U.S. 246, 250-52 (1952). "Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978); *see also Liparota v. United States*, 471 U.S. 419, 426 (1985) ("[T]he failure of Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption of our criminal law.")

We believe that Congress intended to include a scienter provision in § 857. The key language is contained in subsection 857(d), which defines "drug paraphernalia" to include only those items "primarily intended or designed for use" with illegal drugs. This phrase serves two purposes: it circumscribes the category of items a defendant may be punished for distributing, and it also strongly implies that some mental state is required. We agree with other courts construing this language to require scienter. *See United States v. 57,261 Items of Drug Paraphernalia*, 869 F.2d 955, 957 (6th Cir.), cert. denied, 493 U.S. 933 (1989); *United States v. 3520 Brighton Boulevard*, 785 F. Supp. 141, 143 (D. Colo. 1992); *United States v. Main Street Distributing Inc.*, 700 F. Supp. 655, 666 (E.D.N.Y. 1988).

In ruling that § 857 does not require scienter, Judge Sweet relied on differences between § 857 and the DEA Model Drug Paraphernalia Act on which it was patterned. The Model Act contains an explicit scienter requirement, one framed in terms of knowledge, either actual or constructive. It punishes a person who delivers drug paraphernalia "knowing, or under the circumstances where one reasonably should know, that it will be used" with illegal drugs. Model Act, art. II § C (1979). This phrasing does not appear in § 857.

We recently relied on differences between § 857 and the Model Act as an aid in classifying the items covered by § 857. *See United States v. Hong-Liang Lin*, No. 91-1297, slip op. at 3428-3430 (2d Cir. May 1, 1992) (omission of cocaine vials, listed in Model Act, indicates that § 857 does not cover such items). It does not follow, however, that such a comparison should determine whether § 857 requires scienter.

The absence from § 857 of the Model Act language does not override the presumption in favor of requiring scienter, especially in light of other textual support suggesting that Congress intended that § 857 include a scienter element.

Since the scienter standard is not explicitly set forth but only implied by the wording of the definitional section, it is not surprising that the content of the element is somewhat uncertain. The uncertainty arises both from the different meanings of the word "intent" in criminal statutes and from the special complication in this statute that the phrase "primarily intended or designed for use" serves the dual purpose of defining the item and implying a scienter requirement.

Fortunately, the legislative history of § 857 offers some guidance. During hearings on the bill that became § 857, Representative McCollum questioned Representative Levine, the sponsor of the bill, about the intent language. After recognizing that the phrase "designed for use" was clearly very narrow, Representative McCollum asked for clarification of "primarily intended for the use." Acknowledging that scienter was necessary, Representative Levine stated that the government would be required to prove "intent on the part of the defendant in a particular trial" to obtain a conviction under the "primarily intended" standard. Mail Order Drug Paraphernalia Control Act: Hearings on H.R. 1625 Before the Subcomm. on Crime of the House Comm. of the Judiciary, 99th Cong., 2d Sess. 19-21 (1986).

Accordingly, we find that "primarily intended" refers only to the subjective intent of the person charged with dealing in the proscribed articles. Intent here, however, refers only to knowledge about likely consequences. To show a defendant "primarily intended" to sell drug paraphernalia, the government need not show that the items would necessarily be used in connection with illegal drugs, but it must prove that the defendant knew there was a strong probability the items would be so used. *See 57,261 Items of Drug Paraphernalia*, 869 F.2d at 957 ("The person to whom the statute is being applied....must have knowledge that there is a strong probability that the items will be used" with illegal drugs.); 3520 Brighton Boulevard, 785 F. Supp. at 143)"[T]he only person whose intent is relevant for purposes of prosecution under this statute is that of the defendant on trial."); *Main Street Distributing Inc.*, 700 F. Supp. at 666 (The statute focuses on "a defendant's use of the mails ... to facilitate transactions involving items that a defendant has designed or intends for use as drug paraphernalia . . .regardless of what an ultimate purchaser contemplates or what the

defendant knows in that regard..")

The second category of items covered by §857 are those items "designed for use" with illegal drugs. Under this standard, a product qualifies as paraphernalia if it is "principally used with illegal drugs by virtue of its objective features." *Hoffman Estates*, 455 U.S. at 501 ("designed for use" is determined by the design of the manufacturer, not the intent of the retailer or customer); see also *United States v. Dyer*, 750 F. Supp. 1278, 1284-1286 (E.D. Va. 1990). Dual purpose objects are highly unlikely to meet this standard. See Hoffman Estates, 455 U.S. at 501 ("It is also sufficiently clear that items which are principally used for nondrug purposes . . .are not `designed for use' with illegal drugs."). If the objective features of an item establish per se that it is "designed for use" with illegal drugs, the scienter element is satisfied.

II. Vagueness

Although Judge Sweet's opinion did not specify whether he found § 857 unconstitutionally vague on its face or vague as applied to these defendants, the defendants press both theories on appeal. The claim of facial vagueness has no merit. To show a statute is unconstitutionally vague on its face, "[t]he complainant must prove that the enactment is vague `not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. Such a provision simply has no core.'" *Hoffman Estates*, 455 U.S. at 495 n7. (quoting *Smith v. Goguen*, 415 U.S. 566, 578 (1974)(citation omitted)). In other words the statute must be impermissibly vague in all of its applications. *Hoffman Estates*, 455 U.S. at 495. Because § 857 clearly prohibits trade in hard-core drug paraphernalia having no alternative uses, the statute is not vague on its face. *See Dyer*, 750 F. Supp at 1294-95.

To determine whether a statute is unconstitutionally vague as applied, the Supreme Court has articulated a two-part test: the court must first determine whether the statute "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and then consider whether the law "provide[s] explicit standards for those who apply [it]." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (footnote omitted); *see also Gentile v. State Bar of Nevada*, 111 S.Ct. 2720, 2732 (1991); Hoffman Estates, 455 U.S. at 498.

The scienter element in § 857 ensures that defendants have

notice that their conduct is prohibited. *See Hoffman Estates*, 455 U.S. at 499 (A "scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice... that [the] conduct is proscribed.") Because defendants must have the requisite scienter in order to violate the statute, it poses no trap for the innocent and survives the first prong of the vagueness test.

Furthermore, § 857 provides sufficient guidance to prohibit its arbitrary or discriminatory application. Effective law enforcement often "requires the exercise of some degree of police judgment" but this alone does not render a statute unconstitutional. *Grayned*, 408 U.S. at 114. Provisions in the statute itself strive to channel enforcement activities: subsection (d) offers 15 examples of targeted paraphernalia and subsection (e) lists eight factors of consider among "all other logically relevant factors" in determining whether a defendant had the requisite scienter to violate the statute. These guidelines tend to minimize the likelihood of arbitrary enforcement by providing objective criteria against which to measure possible violations of the law. *See Murphey v. Matheson*, 742 F.2d 564, 574 (10th Cir. 1984). In addition, the exemption provided in § 857 (f) restrict the range of the statute and help safeguard legitimate users of legal products from discriminatory enforcement. The guidelines and exemptions, taken together, narrow the scope of § 857 sufficiently to eliminate potentially vague or arbitrary interpretations. *Cf. Hoffman Estates*, 455 U.S. at 504 (administrative regulations can suffice to clarify a standard which might otherwise be uncertain).

Because we conclude that § 857 requires scienter and is not unconstitutionally vague, either on its face or as applied to the defendants, the order of dismissal is reversed and the case is remanded for further proceedings.

APPENDIX

§ 857. Use of Postal Service for sale of drug paraphernalia

(a) Unlawfulness

It is unlawful for any person-

(1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia;

(2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia;

(3) to import or export drug paraphernalia.

(b) Penalties

Anyone convicted of an offense under subsection (a) of this section shall be imprisoned for not more than three years and fined not more than $100,000.

(c) Seizure and forfeiture

Any drug paraphernalia involved in any violation of subsection (a) of this section shall be subject to seizure and forfeiture upon the conviction of a person for such violation. Any such paraphernalia shall be delivered to the Administrator of General Services, General Services Administration, who may order such paraphernalia destroyed or may authorize its use for law enforcement or education purposes by Federal, State, or local authorities.

(d) Definition of "drug paraphernalia"

The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act (title II of Public Law 91-513). It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana,

cocaine, hashish, hashish oil, PCP, or amphetamines into the human body, such as-

(1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(2) water pipes;

(3) carburetion tubes and devices;

(4) smoking and carburetion masks;

(5) roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(6) miniature spoons with level capacities of one-tenth cubic centimeter or less;

(7) chamber pipes;

(8) carburetor pipes;

(9) electric pipes;

(10) air-driven pipes;

(11) chillums;

(12) bongs;

(13) ice pipes or chillers;

(14) wired cigarette papers; or

(15) cocaine freebase kits.

(e) Matters considered in determination of what constitutes drug paraphernalia

In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

(1) instructions, oral or written, provided with the item concerning it use;

(2) descriptive materials accompanying the item which explain or depict its use;

(3) national and local advertising concerning its use;

(4) the manner in which the item is displayed for sale;

(5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;

(7) the existence and scope of legitimate use of the item in the

community; and

(8) expert testimony concerning its use.

(f) Exemptions

This section shall not apply to-

(1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items; or

(2) any item that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

21 U.S.C. § 857.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

OPINION

- against -

90 Cr. 0656 (RWS)

JERRY SCHNEIDERMAN, JERRY RANALLO, LARRY BUTLER and INSERTION ADVERTISING CORP.,

Defendants.

A P P E A R A N C E S:

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Sweet, D.J.

Defendants Jerry Schneiderman ("Schneiderman"), Jerry Ranallo ("Ranallo"), Larry Butler ("Butler") and Insertion Advertising Corp. ("Insertion Advertising") have been charged in a fourteen count indictment with selling and conspiring to sell drug paraphernalia through the services of an interstate conveyance under 21 U.S.C. § 857 and with laundering and conspiring to launder the proceeds of such sales under 18 U.S.C. §1956 and § 1957.

The defendants have moved to suppress all evidence seized pursuant to search warrants issued on August 20, 1990, to dismiss the drug paraphernalia charges on grounds that § 857 is unconstitutionally vague, and to dismiss the money laundering charges on grounds that the statute is not violated by their conduct or that it is unconstitutionally vague as applied to their conduct. For the reasons stated below, the motion to suppress is denied. The motion to declare § 857 unconstitutional is granted, and the charges against the defendants are dismissed. The constitutionality of § 1956 and § 1957 is not addressed.

I. The Statute

The statute giving rise to the indictment and the warrants at issue is 21 U.S.C. § 857. It was enacted in 1986 as part of the Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207, in an attempt to stem the flow of drug paraphernalia sales. *Hearings Before the Subcomm. on Crime of the House Comm. of the Judiciary on H.R. 1625*, 99th Cong., 2d Sess. 16-17 (1986) [hereinafter *Hearings*] (statement of Rep. Levine). It was proposed to "help in the effort to end drug abuse by reemphasizing that society continues to oppose any glamorization or acceptance of dangerous drug use." *Id.* at 18.

Section 857 provides:

§ 857. Use of Postal Service for sale of drug paraphernalia

(a) Unlawfulness

It is unlawful for any person-

(1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia;

(2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia;

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(b) Penalties

Anyone convicted of an offense under subsection (a) of this section shall be imprisoned for not more than three years and fined not more than $100,000.

(c) Seizure and forfeiture

Any drug paraphernalia involved in any violation of subsection (a) of this section shall be subject to seizure and forfeiture upon the conviction of a person for such violation. Any such paraphernalia shall be delivered to the Administrator of General Services, General Services Administration, who may order such paraphernalia destroyed or may authorize its use for law enforcement or education purposes by Federal, State, or local authorities.

(d) Definition of "drug paraphernalia"

The ~~term "drug paraphernalia"~~ means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under the Controlled Substances Act (title II of Public Law 91-513). It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body, such as-

(1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(2) water pipes;

(3) carburetion tubes and devices;

(4) smoking and carburetion masks;

(5) roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(6) miniature spoons with level capacities of one-tenth cubic centimeter or less;

(7) chamber pipes;

(8) carburetor pipes;

(9) electric pipes;

(10) air-driven pipes;
(11) chillums;
(12) bongs;
(13) ice pipes or chillers;
(14) wired cigarette papers; or
(15) cocaine freebase kits.

(e) Matters considered in determination of what constitutes drug paraphernalia

In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

(1) instructions, oral or written, provided with the item concerning it use;
(2) descriptive materials accompanying the item which explain or depict its use;
(3) national and local advertising concerning its use;
(4) the manner in which the item is displayed for sale;
(5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
(6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;
(7) the existence and scope of legitimate uses of the item in the community; and
(8) expert testimony concerning its use.

(f) Exemptions

This section shall not apply to-

(1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items; or

(2) any item that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

21 U.S.C. § 857.

The statute was repealed in 1990 and reenacted as 21 U.S.C. § 863. Pub. L. 101-647, § 2401(d), 104 Stat. 4859 (1990). The only difference between the two statutes is in their scope. Section 863(a) drops its predecessor's scheme requirement, *compare* 21 U.S.C. § 857(a)(1), and applies to all sales of drug paraphernalia, including intrastate transactions. *See* 21 U.S.C. § 863(a)(1); H.R. Rep. 681, 101st Cong., 2d Sess. (1990). The remaining provisions are the same.

II. Prior Proceedings and Factual Background

On August 22, 1990, the Government obtained warrants to search the offices of Insertion Advertising and Central City Restaurant Supply Co. ("Central City") at 132 West 24th Street in Manhattan, to search Schneiderman's premises, and to seize three bank accounts. The warrants were based solely on affidavits supplied by United States Customs Agent Peter Arnone (the "Agent"), and were issued by the Honorable James C. Francis IV (the "Magistrate") and executed that day.

In the affidavits, the Agent swore that, among other things:
(1) He had been a Customs Agent for seven years and had been investigating drug paraphernalia cases for fourteen months.

(2) He had probable cause to believe that Insertion Advertising and Central City were violating drug paraphernalia and money laundering laws.

(3) An investigation showed that Insertion Advertising and Central City were closely intertwined, sharing a common space, phone number, and ownership.

(4) In searches at other locations throughout the United States from January 1987 to the present, documents were found showing involvement by Insertion Advertising in drug paraphernalia sales. (The affidavit summarized several such documents and attached examples.)

(5) All of Insertion Advertising's and Central City's income and moneys in their bank accounts were the fruits of an illegal trade.

(6) Various sums of money were transferred from the companies' accounts to Schneiderman's bank accounts.

(7) Neither Insertion Advertising nor Central City had any legitimate source of income.

Numerous items of alleged drug paraphernalia, as well as

business papers, were seized from both premises and from two delivery vehicles parked outside the businesses.

On October 20, 1990, the defendants were named in a fourteen count indictment. The first count charges a conspiracy to violate federal drug paraphernalia and money laundering laws under 18 U.S.C. § 371. The second through sixth counts charge that the defendants used interstate conveyances as part of a scheme to sell drug paraphernalia in violation of 21 U.S.C. § 857(a)(1). The seventh through twelfth counts charge the defendants with selling drug paraphernalia in interstate commerce in violation of 21 U.S.C. § 857(a)(2). Count 13 charges Schneiderman, Ranallo and Insertion Advertising with violating 18 U.S.C. §1956(a)(1)(A)(i). Count 14 charges Schneiderman and Insertion Advertising with violating 18 U.S.C. § 1957(a).

The present motion was made on March 29, 1991. Oral argument was heard on September 20, and final submissions were received from the defendants on October 11, 1991.

III. The Search Warrants

Defendants challenge the Magistrate's finding of probable cause on several grounds. First, they argue that none of the items listed in the affidavits as drug paraphernalia is per se contraband and that no physical description of any of the items accompanied the affidavits. Second, they attack the Agent's expertise. Third, the defendants point out a number of inconsistencies and falsehoods in the affidavits, namely: that Insertion Advertising and Central City had no other source of income other than that derived from trafficking in drug paraphernalia; that the companies made large sales of drug paraphernalia; that all of Central City's sales consisted of drug paraphernalia; and that water pipes were sold for a drug-related purpose. Fourth, they contend that the Agent intentionally withheld information from the Magistrate weighing against probable cause.

A defendant arguing that a warrant was issued on less than probable cause faces a heavy burden. "'Where the circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner.'" *Rivera v. United States*, 928 F.2d 592, 602 (2d Cir. 1991) (quoting *United States v. Ventresca*, 380 U.S. 102, 109 (1965)). In a marginal case, preference is to be accorded to the warrant. For the reasons stated below, the warrants were adequately supported by probable cause.

Defendants' contention that it was improper for the Magistrate to rely on the Agent's "bogus" claim of expertise is without merit. A government agent's expertise is an important factor to be considered in making a probable cause determination. *See, e.g., United States v. Benevento*, 836 F.2d 60, 71 (2d Cir. 1987), *cert. denied*, 486 U.S. 1043 (1988); *United States v. Fama*, 758 F.2d 834, 838 (2d Cir. 1985). The Agent's affidavit stated that he had been with the United States Customs Service for seven years and had worked principally on drug paraphernalia matters for the last fourteen months. This kind of expertise is frequently helpful when determining whether there is probable cause, and the Magistrate was entitled to rely upon it. *United States v. Glass Menagerie Inc.*, 721 F. Supp. 54, 58 (S.D.N.Y. 1989).

Defendants also contest the Agent's description of the objects at issue. None is contraband per se, but the possibility of innocent uses for such objects does not negate probable cause. *United States v. Main Street Distrib. Inc.*, 700 F. Supp. 655, 660 (E.D.N.Y. 1988). Section 857 provides an exhaustive list of items that may be considered contraband, and, assuming that the statute is constitutional, the Magistrate could rely on the Agent's description in determining whether any of these items fall within § 857's terms.

In particular, the defendants contend that the Agent failed to describe the physical attributes of any item and to set forth a basis for determining that a particular item might be considered drug paraphernalia under the statute. In many instances the Agent simply "translated" an invoice description to match § 857's terms. However, the affidavit did include two exhibits depicting water pipes, one of which, Exhibit C, was related to a sales invoice seized elsewhere detailing sales of water pipes to Insertion Advertising. Exhibit C consists of illustrations of water pipes. Beneath each pipe is a number that in certain instances corresponds to item numbers on the seized invoice. Since water pipes do fall within § 857's definition list, 21 U.S.C. § 857(d)(2), and this invoice indicates that Insertion Advertising was purchasing a large number of water pipes, there was sufficient probable cause.

This finding is further supported by the other invoices and circulars that were seized. Although no physical description of many of the items listed was provided, given the correlation between the above invoice and the Agent's accurate description of the objects as water pipes, and the Agent's expertise in these matters, the Magistrate was entitled to rely on the descriptions in making the probable cause determination. *See Glass Menagerie*, 721 F. Supp. at 59.

Moreover, the affidavit also was based on information provided by other Customs Agents, a confidential informant, and financial investigators. This information includes a telephone call made by an informant/employee of an alleged "headshop" and taped by Customs Agents-during which the informant placed an order with Insertion Advertising for 16 water pipes, 3 suede snuff kits, and 36 bulk inhalers. The order was delivered to the purchaser via United Parcels Service ("UPS"). The item numbers for the water pipes ordered correspond to water pipes depicted in a flier distributed by Insertion Advertising that was also attached to the affidavit. The Magistrate was entitled to consider all of the business dealings of the defendants and the Agent's expertise in making a probable cause determination. Since it can be inferred from the affidavit that the items sold by the defendants are drug paraphernalia, the search warrants are adequately supported by probable cause. *Glass Menagerie*, 721 F. Supp. at 58-59.

More troubling, though, are the defendants' allegations that the affidavits contain falsehoods. In particular, they point to the Agent's assertion that neither Insertion Advertising nor Central City had a source of income besides that from the sales of drug paraphernalia. *See* Rider Affidavit to Search Warrant ¶¶ 11, 13. Defendants correctly note that Exhibit A to the affidavit, an Insertion Advertising sales flier, lists several items that cannot be considered drug paraphernalia, including sunglasses, sunglass leashes, nail care sets, key rings, and condoms. Exhibit B, a Customs list summarizing Insertion Advertising invoices, consists mostly of entries for "RUSH,"[1] which does not seem to fall within any of § 857's definitions. Moreover, it appears that Central City sold only two items: nitrous oxide propellant cartridges and whipped cream making machines, neither of which fall directly within § 857's terms.[2]

Assuming that defendants' contention is correct and that the assertions by the Agent were false, there was still an adequate amount of information supplied in the affidavits upon which a probable cause determination could be made. To be entitled to a *Franks* hearing, defendants would have to make a substantial showing that the Agent knowingly or intentionally made false statements, and that these

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1 Prior to February 1989, Rush and like products contained Butyl nitrite products designed to be inhaled were banned as hazardous under the Consumer Product Safety Act in February of 1989. 15 U.S.C.A. § 2057a (West Supp. 1990). At the time in question, sales of RUSH were legal.

2 In footnote 2 of the affidavit, the Agent acknowledges that "[n]itrous oxide is legally used as an anesthetic and in aerosol cans such as whip cream dispensers."

statements were necessary to a finding of probable cause. *Rivera*, 928 F.2d at 604. Ignoring the alleged false statements, there still remains the invoices seized at other locations, the two exhibits depicting water pipes, information supplied by a confidential informant, and additional investigations carried out by Customs Agents. As a whole, there remains sufficient information within the affidavits to support a finding of probable cause.

Defendants also challenge the Agent's description of the water pipes as drug paraphernalia. In support of this contention, they argue that the objects in question are protected by United States Patent No. 3,881,499. They note that the Agent fails to mention this fact explicitly in the affidavit, although a patent notice does appear at the bottom of Exhibits C and D. However, the patent itself is for a "Water Pipe or Bong," and it notes that such devices are used "to smoke organic materials, including tobacco." Assuming that the statute is valid and given § 857(d)(2)'s explicit inclusion of "water pipes" within its definition of drug paraphernalia, it is difficult to see how the existence of the patent helps the defendants' argument against probable cause. *See Glass Menagerie*, 721 F.Supp. at 60.

Finally, the defendants argue that the search should be suppressed because the Agent withheld material evidence regarding intent. In particular, they point to a flyer distributed by Insertion Advertising alerting retailers to the impending illegality of products containing butyl nitrate, including RUSH, and to two telephone conversations with Insertion Advertising personnel during which the government informant was told that certain products were not available because they were too controversial or because there was a question as to their legality.

Omitted information may also serve as the basis for a *Franks* challenge. *United States v. Campino*, 890 F.2d 588, 592 (2d Cir. 1989), *cert. denied*, ___ U.S.___, 110 S. Ct. 1787 (1990). Recklessness may be inferred where an omission is "clearly critical" to the probable cause determination. *Rivera*, 928 F.2d at 604. Here, the omitted information does not reach the required degree of significance. The butyl nitrate products, as discussed above, are arguably outside of § 857's terms. Although the phone conversations demonstrate the defendants attempted to avoid questions of legality, in one of the conversations the informant succeeded in placing an order for various water pipes that were shipped via UPS. The conversations therefore cut both ways, and their omission was not "clearly critical" to a probable cause determination.

Viewing the affidavits as a whole, there was adequate information upon which the magistrate could make a probable cause

determination. Defendants motions to suppress and for a *Franks* hearing are denied.

IV. Section 857

Defendants challenge the constitutionality of § 857 on three grounds. First, they argue that it fails to provide a scienter requirement. Second, they contend that it fails to provide fair notice of what is proscribed and to guard against arbitrary and discriminatory enforcement. Third, they assert that it impermissibly shifts the burden of proof to the defendants. Based on the following conclusions, § 857 is held to be unconstitutionally vague.

A. The Constitution

The Fifth Amendment's Due Process clause requires that all persons of common intelligence "not be forced to guess at the meaning of the criminal law." *Smith v. Goguen*, 415 U.S. 566, 574 (1974). In fact, Due Process abhors broadly written, ill-defined criminal enactments, for "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese*, 92 U.S. 214, 221 (1876).

In particular, vague laws are to be avoided since they "trap the innocent by not providing a fair warning," and "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Moreover, "the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." *Colautti v. Franklin*, 439 U.S. 379, 395 (1979)

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion." *Morissette v. United States*, 342 U.S. 246, 250 (1952). It instead is a basic tenet. Due Process therefore allows the imposition of strict criminal liability only in narrow instances, typically regulatory measures, where the penalties are relatively small. *See id.* at 258 ; *see also Main Street Distr.*, 700 F.Supp. at 663.

However, "'[m]ere omission of intent in [a] statute will not be construed as eliminating that element from the crimes denounced'; rather, Congress will be presumed to have legislated against the

background of our traditional legal concepts which render intent a critical factor . . . ." *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) (quoting *Morissette*, 342 U.S. at 263). Additionally, there is a presumption favoring the constitutionality of congressionally enacted statutes and a requirement that criminal statutes be read in a narrow fashion, favoring leniency. *See Liparota v. United States*, 471 U.S. 419, 427 (1985). Nevertheless, these rules of construction must be balanced against the precepts of the Bill of Rights. *See, e.g., United States v. Eichman*, 110 S. Ct. 2404, 2408-09 (1990); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Reese*, 92 U.S. at 221.

B. Drugs and Drug Paraphernalia

In recent years, Congress has actively addressed the Nation's use of drugs. Laws have been passed outlawing the importation, distribution, sale, possession, and manufacturing of drugs; old laws have been revisited and revamped; and other bills have been passed enhancing the funds allocated to enforcement agencies. *See, e.g.*, Crime Control Act of 1990, Pub. L. 101-647, 104 Stat. 4859; Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4382; Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207. Part and parcel with this attention has been an effort to stretch laws to their limits.

As a result, the United States may now prosecute those found in international waters on board a vessel containing contraband with importing controlled substances into the United States. *See* 46 U.S.C. 1903; *United States v. Mena*, 863 F.2d 1522 (llth Cir.), *cert. denied*, 493 U.S. 834 (1989). The Attorney General has been delegated the power to temporarily classify a substance as a Schedule I narcotic without a hearing, rendering the substance prohibited. *See* 21 U.S.C. 811(h); *Toubv v. United States*, 111 S.Ct. 1752 (1991). Enhanced sentences are imposed upon those who sell drugs within 1000 feet of any school or university, whether or not they are aware of their presence within the proscribed distance. *See* 21 U.S.C. 860(a); *United States v. Falu*, 776 F.2d 46 (2d Cir. 1985). A less than clear statutory definition can lead to the imposition of a penalty of life imprisonment without parole *See* 21 U.S.C. 848(b); *United States v. Torres*, 683 F.Supp. 56 (S.D.N.Y. 1988).

When Congress enacted its drug paraphernalia statute in 1986, it had an abundance of prior interpretations of paraphernalia laws to draw upon in discerning the law's limits. Such laws first appeared in the mid-1970s. These early attempts at regulating sales of drug paraphernalia frequently were struck down as unconstitutionally vague. Courts often found that their scope included everyday items and that

their terms were readily capable of being arbitrarily enforced. In 1979, the Drug Enforcement Agency proposed the Model Drug Paraphernalia Act ("Model Act") as a cure. Its key ingredient was the inclusion of an intent standard. *See Note, The Model Drug Paraphernalia Act: Can We Outlaw Head Shops–And Should We?*, 16 Ga. L. Rev. 137, 154 (1981). Since then, the Model Act's criminal provisions have withstood multiple challenges. *See, e.g., Levas & Levas v. Village of Antioch*, 684 F.2d 446 (7th Cir. 1982); *Casbah. Inc. v. Thone*, 651 F.2d 551 (8th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1982).

Additionally, the Supreme Court upheld an ordinance requiring businesses to obtain a license to sell drug paraphernalia in 1982. *Village of Hoffman Estates v. The Flipside. Hoffman Estates. Inc.*, 455 U.S. 489 (1982). The ordinance at issue there was not based upon the Model Act, but did prohibit anyone from selling an object "designed or marketed for use" with drugs without a license. Using the relaxed standard of review that applies to civil regulations, the Court found that the ordinance was somewhat ambiguous but not unconstitutionally vague, and that it provided sufficient notice to retailers of such objects. *Id.* at 500-04.

Against this backdrop, Congress enacted § 857, a criminal statute. Although its sponsor, Representative Mel Levine, stated that § 857 was "drafted closely after the Model Drug Paraphernalia Act," *Hearings, supra*, at 15, it in fact differs significantly from the Model Act. In its most significant departure, § 857 omits the Model Act's scienter standard.

C. Scienter

"A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution." *Morissette*, 342 U.S. at 250-51. Statutes imposing strict criminal liability are therefore permissible only in narrow instances.

Defendants contend that although Congress patterned § 857 after the Drug Enforcement Agency's Model Drug Paraphernalia Act ("Model Act"), the statute is fatally flawed since it does not replicate the Model Act's scienter standard. This omission, argue defendants, evidences Congress's intention that scienter not be an element under § 857.

Section 857(a) states:

It is unlawful for any person-
(1) to make use of the services of the Postal Service or other interstate conveyance as part of a scheme to sell drug paraphernalia;
(2) to offer for sale and transportation in interstate or foreign commerce drug paraphernalia; or
(3) to import or export drug paraphernalia.

18 U.S.C. § 857(a). The statute is facially devoid of a mens rea requirement. Its Model Act counterpart states:

It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver, drug paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to . . . conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this Act.

Model Drug Paraphernalia Act, art. II, § C (1979) (emphasis added).

Excision of such an important element of the offense could not have been inadvertent. Congress is well-versed in the variations between the different mens rea requirements and is fully capable of selecting one standard over another. *See Morissette*, 342 U.S. at 264; *United States v. Morris*, 928 F.2d 504 (2d Cir. 1991), *cert. denied*, 60 U.S.L.W. 3258 (1991). Moreover, explicit scienter requirements are found in related statutes. *See, e.g.*, 21 U.S.C. § 843(a)(6) ("knowingly or intentionally . . . possess any . . . equipment specially designed or modified to manufacture a controlled substance, with intent to manufacture a controlled substance"); 21 U.S.C. § 844(a) ("knowingly or intentionally . . . possess a controlled substance"). Here, an intent to omit a scienter requirement is evident.

This conclusion is bolstered by legislative history indicating that the provision's focus was on paraphernalia itself, not potential defendants. For instance, Representative Levine stated that the legislation was targeted at "merchandise which is designed and intended to be used for the sole purpose of abusing drugs." *Hearings*, *supra*, at 16-17. Much focus was placed on what types of objects were included within the statute's terms, *see, e.g.*, *Hearings, supra*, at 54, and whether the proposed list of objects differentiated between "hard core" drug paraphernalia and dual-use objects, *see, e.g.*, *id.* at 65-66. Harry Meyers of the Drug Enforcement Agency's Office of Chief Counsel, in referring to "hard core" paraphernalia, explained that "[i]t is not necessary to show that intent [i.e., for an unlawful purpose] for someone who is selling something that is designed for use with drugs." *Id.* at 69. However, it was also explained to Congress that experience

under the Model Act showed that it can be difficult to prove a defendant's intent when the objects in question have both legitimate and illegitimate uses. *See id.* at 65, 68. It therefore can be inferred that Congress deliberately omitted an intent requirement from the statute in order to draw within the statute's terms as many objects as possible.

Nevertheless, the Government contends that the statute includes an implied requirement that the Government prove the defendants "knowingly" sold drug paraphernalia. *See Government's Memorandum of Law* 49 (emphasis in original). But the Government also contends that it need only show that the items upon which the charges are based are drug paraphernalia by "virtue of their objective characteristics, their nature, and the descriptions and circumstances set forth in" § 857. Then, if the "defendants knew the general nature and character of the items involved," they could be convicted. *Id.* The Government submits that this latter, "objective," approach is appropriate for § 857 offenses several pages later. *See id.* at 54.

Similar confusion over the scienter requirement can be found in the case law. The court in *Main Street Distrib.*, faced with a similar constitutional challenge, found that the statute's focus was on a defendant's use of interstate transporters "to facilitate transactions involving items that a defendant has designed or intends for use as drug paraphernalia." 700 F.Supp. at 666. It based its analysis in part on the language defining drug paraphernalia in § 857(d) and on cases construing like language in other statutes as to require scienter.

Working with the same language, the court in *United States v. Dyer*, 750 F.Supp. 1278 (E.D. Va. 1990), held that the statute did not require proof of a defendant's subjective intent. Instead, "a violation may be established solely by reference to design features or objective circumstances, provided that the government shows the defendant's awareness of the general nature of the object." 750 F.Supp. at 1284.[3]

Falling between these two positions is the Sixth Circuit's view. In *United States v. 57.261 Items of Drug Paraphernalia*, that court stated that "[t]he statute requires an intent to distribute the items for drug use. The person to whom the statute is being applied . . . must have knowledge that there is a *strong probability* that the items will be used in this way." 869 F.2d 955, 957 (6th Cir.) (emphasis added), *cert. denied*, 493 U.S. 933 (1989). That the three courts addressing the issue have failed to agree on a scienter standard can be only because one is

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3 The parties in *Dyer* agreed that § 857 included a scienter requirement. The dispute concerned the exact nature of the requirement. *See Dyer*, 750 F. Supp. at 1283.

not there.

The statute defines "drug paraphernalia" as objects that are "primarily intended or designed for use in" drug-related activities. 18 U.S.C. § 857(d). It is argued that this definition supplies scienter when read into § 857(a). However, as the *Dyer* court demonstrated, the structure of the act argues against this conclusion. If the language referred to a defendant's intent toward the objects, then Congress would not have followed it with a laundry list of terms describing paraphernalia, or a separate subsection of matters to be considered in determining whether an object is paraphernalia. Rather, Congress was attempting to further define what types of objects are "primarily intended or designed for use in" drug-related activities. There is no language in § 857(d) directed at potential defendants per se and the invitation to read an intent element within it into § 857(a) is declined. *Cf. Dyer*, 750 F. Supp. at 1288.

The court in *Main Street Distrib.* reached an opposite conclusion. That court found that by including the term "drug paraphernalia" in the offense section, any scienter requirement within that definition is included. 700 F. Supp. at 666. However, any statute that made it an offense to sell drug paraphernalia would have to state that it is "unlawful to sell drug paraphernalia." Indeed, under § 857 it is unlawful for the defendant "to sell or offer for sale and transportation in interstate or foreign commerce [anything "primarily intended or designed for use" with drugs]." In applying these terms, a decisionmaker must first determine whether an object at issue is drug paraphernalia. To do so, the decisionmaker would turn to the statute's definitional section and apply it to the object. If the object is found to be drug paraphernalia, the decisionmaker would then turn to the offense section and apply it to the defendant's conduct.

The "primarily intended" language refers to the objects at issue and arguably to their manufacturer's or ultimate end user's designs. It does not relate to the defendant's state of mind; under the terms of § 857, the defendant has only to have sold such objects. The definitional language never shifts the focus onto the defendant's scienter. *See also Franza v. Carey*, 518 F. Supp. 324, 339 (S.D.N.Y. 1981) (under Model Act, "seller's intent that an item be used for a drug-related purpose defines drug paraphernalia while his actual or constructive knowledge that the sale or potential sale will facilitate illegal drug use defines the offense").

Section 857 is therefore a strict liability offense. The defendant's mens rea is not analyzed. Instead, one looks at whether a person who designed an object had a drug-related purpose or whether

an end-user can use it in a drug-related activity. That an object may have legitimate uses is only a factor to consider when determining whether that object is drug paraphernalia, and not when determining the defendant's intent.

Due Process permits the imposition of strict criminal liability. However, this allowance is narrow, generally limited to statutes and offenses that are regulatory in nature. *Morissette*, 342 U.S. at 260; *cf. Hoffman Estates*, 455 U.S. at 504. Section 857's nature is criminal. It does not attempt to license sales of paraphernalia, it penalizes them. It carries a penalty of not more than three years imprisonment and a $100,000 fine. Moreover, violating its terms can serve as a predicate offense for other crimes, including the mail fraud charges alleged here, furthering the statute's criminal nature and the penalty that may be imposed. *See, e.g.*, 18 U.S.C. § 1956(c)(7)(D).

Hoffman Estates is also distinguishable. There, the Supreme Court found a scienter requirement in a civil licensing regulation's definition of drug paraphernalia. That regulation applied to objects "designed or marketed for use" with drugs. 455 U.S. at 506. In a pre-enforcement facial challenge brought by a retailer, the Court found that its definition "requires scienter, since a retailer could scarcely 'market' items 'for' a particular use without intending that use." *Id.* at 502; *see also Levas & Levas*, 684 F.2d at 454-56 (pre-enforcement facial challenge to ordinance imposing fine of $500 for sale of drug paraphernalia denied).

The legislation here is a criminal statute, and the challenge is being made post-enforcement. Section 857 does not include the "marketed for use" language the Supreme Court found acceptable, but instead targets objects "primarily intended or designed for use" with drugs. The Supreme Court itself found that "designed for use" did "contain ambiguities," 455 U.S. at 502, and that its focus is on the manufacturer of the objects, *id.* at 501 n.19. A stricter examination of this criminal statute must be performed. Here, there is no unambiguous intent language and no language that requires the present defendants' intent to be analyzed.

The Court therefore finds that 21 U.S.C. § 857 is a strict liability offense that is criminal in nature.

D. Vagueness

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that

does not encourage arbitrary and discriminatory enforcement. . . . [T]he more important aspect of the vagueness doctrine 'is not the actual notice, but the other principal element of the doctrine--the requirement that a legislature establish minimal guidelines to govern law enforcement."' *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (quoting *Smith v. Goquen*, 415 U.S. 566, 574 (1974); citations omitted).

Defendants' vagueness challenge centers on the statute's definition of drug paraphernalia. They argue that the phrase "primarily intended or designed for use" is vague as applied to their conduct and that the list of fifteen examples and the eight factors to consider when making a determination of whether an object is drug paraphernalia do not save the definition.[4]

The gist of the problem is that the word "primarily" changes the focus of the determination. The phrase is not defined further. Instead, the statute presents a number of factors to consider in making a determination. The list of objects, though, provides little guidance. Most seem to be pipes of one sort or another, including "bongs,"[5] "chillums,"[6] and "metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes." *See also Hearings*, *supra*, at 118-26 (statement of L. Maccubbin). In fact, any type of pipe imaginable is included in the list. Nor is the list exclusive, for the Government contends that items not specifically listed may also be considered paraphernalia under the rest of 857(d), such as scales.

The statute's focus is not placed on any objective factor, but on the purposes of potential users or designers. To divine what these purposes may be in a particular case, the statute suggests examining a number of factors. These include advertising, instructions concerning an object's use, whether a defendant is a licensed distributor of tobacco products, and the scope of legitimate uses for an object in the community. 21 U.S.C. § 857(e). If a decisionmaker is still uncertain, "expert testimony concerning [an object's] use" may be considered. *Id.* § 857(d)(8).

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4 Constitutionally protected conduct is not implicated by the statute, precluding an overbreadth analysis. *Hoffman Estates*, 455 U.S. at 496-97.

5 *See* United States Patent No. 3,881,499.

6 "The part of a water pipe that contains the substance (as tobacco or hashish) which is smoked; . . . a funnel-shaped clay pipe for smoking. *Webster's New Collegiate Dictionary* 193 (1977). 27

However, none of these factors aids the average person in determining whether particular conduct falls within the statute's terms. Its vagueness instead allows it to serve as a tool of arbitrary enforcement.

An example illustrates why this is so. At oral argument, the Government produced a pocket scale sold by the defendants. The scale is calibrated in grams on one side, ounces on the other. The Government submitted that the scale was an example of "hard core" drug paraphernalia.[7] The defense has since submitted a number of these scales, as well as a recent article from the *New York Times* trumpeting their handy use as postal scales. *Postal Scale Grips. Weighs. Then Stores Practically Anywhere*, N.Y. Times, Aug. 3, 1991.

To use the device as a postal scale, one takes an envelope and its contents, places it all inside an alligator clip, suspends the device from one's finger and reads the weight using the calibrated markings. Then the appropriate postage is placed on the envelope, and it can be sent on its way.

To use the device as drug paraphernalia, one takes an envelope and its contents, places it all inside an alligator clip, suspends the device from one's finger and reads the weight using the calibrated markings. Then one charges the appropriate price for the contraband. Or one can simply remove the alligator clip and use it as a roach clip.[8]

Similar illustrations are easily imagined using pipes, baggies, tobacco papers, stash cans, paper clips, spoons, straws, razor blades, etc. *See also* U.S. Int'l Trade Comm., Report on Investigation No. 322-277, at 18-19. Many objects that fall within the statute's terms have dual purposes. Differentiating between purposes is at best guesswork, and the statute's broad language offers no guidance. The concerns about this very language initially led both the Department of Justice and the Postal Service to oppose it. *See Hearings*, *supra*, at 54 (statement of

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7 Though a scale does not fall directly within any of the categories of objects specifically listed as drug paraphernalia in §857(d), one can see how it comes within its terms. The Senate recently proposed amending the definition of drug paraphernalia in §857's replacement. In particular, the proposed amendments would add scales and containers for storing or concealing contraband to the list of objects considered paraphernalia. *See* 137 Cong. Rec. 58880 (daily ed. June 27, 1991).

8 "[O]bjects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand." 21 U.S.C. 857(d)(5).

J. Knapp, Deputy Ass't Attorney General, U.S. Dep't of Justice); *id.* at 61 (statement of J. Swagerty, Ass't Chief Inspector, U.S. Postal Inspection Service). The statute attempts to cure this problem by exempting those people who are authorized to distribute such items or those items that are "traditionally intended for use with tobacco products." 21 U.S.C. § 857(f). However, the exemption is much more limited in scope than the statute's reach.[9]

The defendants' conduct further illustrates the infirmity. They sought to avoid illegal or controversial products to the point of refusing to sell certain products and of sending their customers fliers informing them of the impending illegality of one of their products. Yet even after what appears to have been a conscious effort at compliance, they find themselves in a "trap for the wary as well as the unwary." *Gentile v. State Bar of Nevada*, 59 U.S.L.W. 4858, 4864 (1991).

The inclusion of a scienter requirement often will save an otherwise vague statute. *Hoffman Estates*, 455 U.S. at 499. Additionally, the rule of lenity may save an ambiguous statute by narrowly construing it. *Liparota*, 471 U.S. at 427. However, there is no scienter standard in § 857 that applies to a defendant's conduct and, even if under a lenient construction the statute is limited to "hard core" paraphernalia, its application is still vague, as set forth above.

Once again on this issue, *Hoffman Estates* is distinguishable. The drug paraphernalia ordinance upheld there in a pre-enforcement challenge was regulatory in nature. It imposed a fine of $10 to $500 for selling drug paraphernalia without a license or for otherwise violating its terms.[10] Drug paraphernalia was defined as any item "designed or marketed for use" with drugs. The Supreme Court found the "designed . . . for use" standard marginally clear. It was bolstered by "marketed for use," which "described a retailer's intentional display and marketing of merchandise," thus providing scienter. *See* 455 U.S. at 499-503.

Section 857 is a criminal statute. A greater degree of specificity

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9 Presumably any stationery store that sells postal scales is not exempt from the statute's terms.

10 The ordinance challenged in *Hoffman Estates* provided that: It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs . . . . Village of Hoffman Estates Ordinance No. 969-1978 1; *see* 455 U.S. at 506.

is required. *Id.* at 498. While "designed for use" may be marginally acceptable in a regulatory context, it is unacceptable in a criminal one. Moreover, § 857 lacks the language providing scienter for specific defendants that the regulation in *Hoffman Estates* had. Instead, here the issue is how some unknown person intends to use the object. That a defendant, as here, is located at some mid-point in the commerce stream is irrelevant. The addition of the word "primarily" does not add guidance; it moves the analysis away from the definite to the nebulous.

The statute also encourages arbitrary enforcement. The Government contends that at trial it will show through the various factors listed in § 857(e) that the objects at issue are drug paraphernalia. No doubt this will consist mostly of expert testimony concerning their use, advertising, and sales, as permitted by § 857(e)(8). No doubt, the defendants will put on their own experts who will testify in opposition to the Government's experts. Whether or not criminal guilt has been established may well be determined solely upon expert testimony.

Such a result breeds arbitrary prosecutions and inconsistent results. If a particular enforcement agent on a particular day sees a particular merchant selling a scale or pipe, and at that moment believes the scale or pipe to be paraphernalia, an arrest will be made, "making easy the roundup of so-called undesirables." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972). It will be up to the court to step inside the net to determine whether that day's object, under that day's circumstances, with the guidance of present day experts, is indeed paraphernalia. Under such circumstances, the statute is nothing more than "a convenient tool for 'harsh and discriminatory enforcement by . . . prosecuting officials, against particular groups deemed to merit their displeasure.'" *Id.* at 170 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940)).

The perils of strict liability and arbitrariness are particularly acute when, as here, a post hoc, ad hoc determination must be made. *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). Although drugs and drug merchandizing wreak terrible costs on our society, and Congress may do what it can to address these problems, the Constitution does prescribe limits. Here, the limits imposed by the Fifth Amendment's Due Process clause are breached. Section 857 is ambiguous and lacks a scienter requirement. It fails to provide fair warning and to prevent arbitrary prosecutions. Moreover, "this is not a case where further precision in the statutory language is either impossible or impractical," *Kolender*, 461 U.S. at 361, for the Model Statute provides a valid alternative. *See. e.g.. Levas & Levas*, 684 F.2d 446. 21 U.S.C. § 857 is unconstitutional. The counts in the indictment charging the defendants with selling and conspiring to sell drug paraphernalia are therefore

dismissed.

V. Mail Fraud

Defendants also challenge the application of the Money Laundering Control Act, 18 U.S.C. §§ 1956, 1957, to their behavior and its constitutionality. However, the two money laundering counts are based solely on the alleged violations of the drug paraphernalia statute. 21 U.S.C. § 857(a). Since this opinion holds that § 857 is unconstitutional, these contentions will not be addressed. The money laundering counts against the defendants are dismissed in view of the dismissal of the underlying § 857 counts.

Conclusion

For the reasons stated above, defendants motion to suppress is denied. Defendants motion declaring 21 U.S.C. § 857 unconstitutional is granted, and the indictment against the defendants dismissed.

It is so ordered.

New York, N. Y.
October 29, 1991

/s/

ROBERT W. SWEET
U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th Day of September one thousand nine hundred and ninety-two.

UNITED STATES OF AMERICA,

Appellant,

DOCKET NUMBER: 91-1695

- v. -

JERRY SCHNEIDERMAN, JERRY RANALLO, LARRY BUTLER and INSERTION ADVERTISING CORP.,

Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellees Jerry Schneiderman, Jerry Ranallo, Larry Butler and Insertion Advertising Corp.,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

SO ORDERED:

FOR THE COURT,
Elaine B. Goldsmith, Clerk

By:

Kathy Brouwer,
Operations Manager
9-29-92
Date